

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

90
60892

FILE: B-184662

DATE: May 25, 1976

98920

MATTER OF: United Power & Control Systems, Inc.

DIGEST:

1. Where low bidder's "nonresponsiveness" to Navy IFB experience clause was result of erroneous information peculiarly within Navy's possession from Navy officials upon whom bidder was entitled to rely, Navy acted arbitrarily in rejecting low bid as nonresponsive when award was made to second low bidder who failed to meet other requirements in clause.
2. Although Navy contends bidder's substations had not operated "successfully" as provided in IFB experience clause due to various deficiencies, in absence of contrary definition, if substation operates over 10,000 hours within 5 years (experience clause provision), during which time it performs functions for which it was designed, it could reasonably be concluded that substations met clause's criterion.
3. Navy IFB experience clause, which required substations identical to units, listed under clause as operating successfully for over 10,000 hours, to be furnished under contract, but which also provided for listing units with some characteristics less stringent than IFB purchase description, is defective, and no bidder could satisfy requirements because there is no substation meeting purchase description which has operated over 10,000 hours.

The Naval Facilities Engineering Command, Davisville, Rhode Island, issued invitation for bids (IFB) N62578-75-B-0123, as a total small business set-aside. As amended, the IFB called for the supply of eight 2500 kilovolt-ampere (KVA) capacity, outdoor-type, semi-trailer mounted electrical substations in accordance with Purchase Description 6120-5134-2-75 dated January 1975, as amended. The IFB included an "experience" requirement at paragraph C.17, which provided as follows:

"OPERATIONAL EXPERIENCE

"a. Bids must set forth in the space provided a description of the substation to be provided, by name or model or otherwise, and the names and location of not fewer than three installations of such substations, all of which meet the operational experience requirements set forth below. BIDS NOT CONTAINING THIS INFORMATION MAY BE REJECTED AS NON-RESPONSIVE. SUBSTATIONS FURNISHED UNDER THE CONTRACT MUST BE THOSE IDENTIFIED OR DESCRIBED IN THE BID.

"b. The substations to be described in the bid and furnished under the contract must have performed successfully in not fewer than three separate installations for not less than 10,000 hours in each installation during a period of not more than five years. The term 'substation' is defined as including the 15 KV and/or 5 KV switchgear section, a 2000 to 2500 KVA transformer section, and a 480 volt, circuit protective switchgear section assembled together as an integral outdoor type, 3 phase, 60 HZ substation.

"c. Prior to award, the successful bidder will be required to produce evidence that at least three of the installations cited in his bid have met the performance requirements.

"d. Substation experience as required in the above paragraphs may be substations manufactured under one contract provided that three (3) separate units have performed the required number of hours at three (3) separate installations."

The Navy regards paragraph C.17 as a matter of responsiveness. In this regard, the Navy states:

"The purpose of including this provision was to assure that the units to be furnished under the contract, which are required for tactical support of naval operations, would be products whose reliability had been demonstrated and proven through actual use. * * *"

Five bids were received. The low bid in the amount of \$596,700 was submitted by United Power & Control Systems, Inc. (United). The second low bid in the amount of \$922,900 was submitted by the Abbott Power Corporation (Abbott). In its bid, United identified eight substations to satisfy the paragraph C.17 experience requirements. However, the Navy found that three of the listed substations were units of substantially lower rating (i.e., 300 KVA, 1000 KVA, and 1500 KVA) than the 2500 KVA rating required to be furnished under the IFB. Only one of the 2500 KVA capacity units listed had operated more than the requisite 10,000 hours. The other four 2500 KVA units had operated approximately 8,300, 7,000, 5,087, and 2,000 hours, respectively. Consequently, the Navy rejected United's bid as nonresponsive.

In addition, the Navy contends that United could not comply with paragraph C.17 even if it listed in the bid three substations which operated for over 10,000 hours. The Navy states that United would not have been permitted to furnish units identical to the 2500 KVA units listed in its bid, which the Navy states is required by paragraph C.17. The listed 2500 KVA substations were determined to have substantial technical deficiencies which rendered them hazardous and has caused them to repeatedly fail in service.

The listed substations had been delivered under Navy contract No. 62578-72-C-0019 (-0019), dated December 23, 1971, for the supply of 41 substations. The Navy has listed a number of alleged and admitted defects in these substations. In particular, the Navy references its recent determination that the United substations, as currently fabricated, should not be operated above 5 kilovolts (KV). This determination was primarily based on United's use of 5 KV rated cable in the high voltage section of the substation and the lack of adequate shielding between the 5 KV cable, even though up to 13.8 KV in voltage is contractually required to be transmitted over the cable. The 41 substations have been retrofitted by United several times due to various deficiencies. The Navy and United are disputing the need and responsibility for another retrofit because of the Navy's determination that the substations are not fit for use over 5 KV. Consequently, the Navy has concluded that the -0019 contract substations could not be deemed to have operated "successfully" under paragraph C.17 of the IFB.

United protested the award of a contract to any firm other than United. Subsequently, Abbott was awarded the contract and an option for four additional substations has been exercised.

United has stated that the five 2500 KVA substations listed in its bid were units that Navy officials had told United had operated for more than 10,000 hours. In this regard, United states that it requested the procuring activity to provide information necessary to comply with paragraph C.17. The procuring activity referred United to a Navy field activity, which furnished United with the serial numbers of five substations supplied under the -0019 contract which it stated would probably have the required 10,000 hours of experience. After bid opening, United was able to list three 2500 KVA units supplied under the -0019 contract which had operated for more than 10,000 hours.

United also disputes the Navy's determination that the -0019 contract units were hazardous or had such technical deficiencies as to not be considered as having operated "successfully." Although United admits some shortcomings in the -0019 contract substations, it asserts that faulty Government specifications and the Government's failure to agree to necessary changes caused most of the technical difficulties. United states that these technical difficulties were remedied in the present IFB according to United's suggestions. United concludes that it would therefore be unreasonable to reject United's bid as nonresponsive under paragraph C.17.

Although the Navy does not deny that its officials gave United wrong information regarding substation experience, it asserts that it was United's responsibility to prepare its bid, and that United cannot later supplement its bid in an attempt to make it responsive. However, it would appear that the operational experience of United's substations was information peculiarly within the Navy's possession, since the -0019 contract substations were scattered throughout the world in various Navy installations and that United's "nonresponsiveness" was the result of erroneous information from the Navy officials to whom United was referred by the procuring activity and upon whom United was entitled to rely.

While the Navy claims that United's listed units cannot be viewed as "successfully" operating for over 10,000 hours under paragraph C.17 due to the many deficiencies which have been listed in the Navy reports, we are not persuaded that United's units necessarily do not meet this criterion. In the absence of a contrary definition, if a substation operates over 10,000 hours within 5 years, during which time it performs the functions for which it was designed, it could reasonably be concluded that the substation has operated "successfully" under paragraph C.17. Although the Navy has recently

decided that United's units cannot be safely operated over 5 KV, the substations eventually listed by United apparently performed the functions for which they were designed for over 10,000 hours within 5 years. This is not to say that United could not have been rejected as a nonresponsible prospective contractor under applicable regulations, provided that the Navy could reasonably support such a determination, an issue which we will not decide here for reasons which are stated below.

Moreover, the Navy did not apply the experience clause requirements as strictly to Abbott's bid as it did to United's bid. The substations Abbott listed in its bid to satisfy the experience requirements did not meet the salient minimum performance characteristics of the "substation" defined in subparagraph C.17.b. (As indicated below, the experience clause substation characteristics were less stringent than the purchase description requirements.) For example, it would appear that the low voltage switchgear sections of two of the substations listed by Abbott were rated at 460 volts rather than the 480 volt minimum stated in paragraph C.17 and paragraph 3.7.3 of the IFB purchase description. However, Abbott's bid was accepted notwithstanding the "nonresponsiveness."

Therefore, we conclude that the Navy acted arbitrarily in rejecting United's bid as nonresponsive to the experience clause requirements when it did not reject Abbott's bid.

In addition, for the reasons stated below, we believe paragraph C.17 was unclear and misleading.

The capitalized last two sentences of subparagraph C.17.a and the first sentence of subparagraph C.17.b state the substations furnished under the contract must meet the paragraph C.17 performance experience criteria (e.g., they must have successfully operated for over 10,000 hours). That is, as indicated by the Navy in rejecting United's bid, the substations supplied under the contract were supposed to be identical to the units listed under paragraph C.17. Also, it is specifically stated that bids not containing this information may be rejected as nonresponsive.

On the other hand, the meaning of the term "substation," as defined in the second sentence of subparagraph C.17.b, is limited to certain general characteristics of the substation called for in the IFB specifications. Moreover, this "substation" definition includes characteristics below the minimum specifications in the IFB purchase description.

For example, the subparagraph C.17.b substation definition includes a "15 KV and/or 5 KV switchgear section." We interpret this provision as permitting the listing of a substation with either a "15 KV" or a "5 KV" switchgear section or both to satisfy the paragraph C.17 requirements. However, paragraph 3.7.1 of the IFB purchase description required the high voltage interrupter switchgear section(s) to consist of separate compartments for a 15 KV switchgear section and a 5 KV switchgear section. As discussed below, neither United's nor Abbott's units operating over 10,000 hours met the IFB requirements in this regard.

In addition, the "substation" definition in subparagraph C.17.b includes "a 2000 to 2500 KVA transformer section." The Navy readily admits that the substations listed by Abbott were rated at 2000 to 2300 KVA. However, paragraph 3.7.2. of the IFB purchase description requires no less than a 2500 KVA rated transformer section (e.g., United's listed substations).

Therefore, it would appear from the subparagraph C.17.b definition of "substation" that the substations, listed as operating over 10,000 hours, did not have to be identical to the units in the IFB purchase description. Apparently, the listed substations could vary from the basic salient characteristics of the substation called for in the IFB purchase description. The foregoing implies that the requirements were not directed at the capability of the actual "item being procured," but rather at the bidder's past demonstrated ability to deliver a successfully operating similar model. See 48 Comp. Gen. 291 (1968); 52 Comp. Gen. 647 (1973).

In addition, subparagraph C.17.c allows for the submittal of evidence showing the substation has met the experience clause performance requirements after bid opening but prior to award. The submittal of evidence regarding a bid after bids are opened is inconsistent with the concept of responsiveness.

Moreover, it would appear that the IFB purchase description is unique in that it contains several characteristics not in previous portable substations of this class. For example, the requirement for separate high voltage switchgear sections was apparently included in the purchase description as a result of a proposed solution to problems in the high voltage section of the -0019 contract substations. This characteristic apparently was not in previous similar substations (e.g., United's and Abbott's listed substations). Also, although output voltage levels in the IFB are similar to those in previous substations, a greater number of outputs has been specified in the IFB than in the listed United and Abbott models. The greater number of specified outputs is probably due to the greater variety of electronic equipment to be powered by the substations and the greater realization by the Navy of what its output requirements are. The IFB purchase description is undoubtedly similar to substations which have operated successfully in excess of 10,000 hours insofar as basic form, fit, and function is concerned. However, in view of evolving Navy requirements and technology, it seems unlikely that any firm could offer a substation which had operated successfully for over 10,000 hours identical to that called for in the IFB purchase description.

In view of the foregoing, we regard the "experience" clause in the IFB as an enigma. That is, it requires the contractor to supply the same unit listed as meeting the 10,000 hour performance experience requirements. However, the experience clause provides for listing units with performance characteristics less stringent than the purchase description requirements and apparently no firm can supply a unit which meets both the experience and purchase description requirements.

The Navy has advised that as of April 9, 1976, seven substations had either been accepted or had been completed awaiting delivery and that Abbott had been paid \$482,210. Consequently, we are unable to conclude that disturbing the award to Abbott would serve the Government's best interests, notwithstanding the Navy's unreasonable actions in this case. See DPF Incorporated, B-180292, September 12, 1974, 74-2 CPD 159; Bristol Electronics, Inc., 54 Comp. Gen. 521 (1974), 74-2 CPD 381.

B-184662

The Navy asserted, only after United filed its protest, that United was a nonresponsible bidder because it demonstrated a lack of tenacity and perseverance to produce an acceptable substation under contract -0019, a determination which was not referred to the Small Business Administration and has been disputed by United. Consequently, we will not discuss this issue or other contentions which have been raised by United in its protest, in view of our determination that the procurement actions in this case were so defective that corrective action would be recommended but for the advanced state of contract performance.

We are, however, bringing the procurement deficiencies we have found to the attention of the Secretary of the Navy.

R. F. K. 11m
Deputy Comptroller General
of the United States